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No. 92-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT

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The National Cable Television Association, Inc. ("NCTA") respectfully submits this brief in support of the Petition for Writ of Certiorari filed by the Solicitor General on behalf of the United States and the Federal Communications Commission ("Petitioner"). NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 90 percent of the nation's 56.2 million cable households.[1] Its members also include cable programmers, cable equipment manufacturers and others affiliated with the cable television industry.

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[1] NCTA has no parent companies, subsidiaries, or affiliates.

NCTA was an intervenor in the proceeding below and is, therefore, a respondent in this proceeding.

INTRODUCTION

This case involves the constitutionality of the line Congress drew to decide which communications entities should be defined as "cable systems" and therefore subject to the provisions of the Cable Communications Policy Act of 1984 (the "Cable Act").[2] A divided panel of the United States Court of Appeals for the District of Columbia Circuit found unconstitutional, under the equal protection component of the Fifth Amendment, Congress' distinction based on the common ownership, management or control of the "multiple unit dwellings" served by satellite master antenna television systems ("SMATVs").

The appellate court purported to apply this Court's deferential test for determining the validity of Congress' legislative classification under the Fifth Amendment. Yet the court rejected the rationality of the distinctions in the so-called "SMATV" exception to the "cable system" definition in the Act as lacking any "conceivable basis." But such a basis surely exists, articulated in the separate concuring opinion of Judge Mikva, in the prior precedent of the expert agency that had originally adopted this distinction, and endorsed by the Federal Communications Commission ("FCC" or "Commission"). This Court should grant Petitioner's request for certiorari to correct the errors in the court of appeals' approach to the "rational basis" test and to prevent the inequities in treatment between functionally equivalent communications services that the appellate court's erroneous decision will cause.

STATEMENT OF THE CASE

At issue here is Congress' different treatment of communications facilities providing cable service to subscribers. Congress established in the Cable Act a compre-

[2] 47 U.S.C. Section 521 *et seq.*

hensive national policy and framework for the regulation of cable television systems at both the federal and local level. As part of that regulatory structure, it imposed a requirement in the Act that a cable operator providing cable service over a cable system obtain a franchise.[3]

Congress defined a "cable system" for purposes of the Act as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . .[4]

Congress also drew several narrow exceptions to the definition, including an exemption that mirrors the FCC's longstanding policy for excluding a facility that serves "only subscribers in one or more multiple unit dwellings under common ownership, control, or management. . . ."[5] And Congress narrowed this "common ownership" exception to apply only if the facility serving commonly owned

[3] 47 U.S.C. Section 541(b)(1) (providing that, except for exemptions not relevant here, "a cable operator may not provide cable service without a franchise.") A "cable operator" provides "cable service" over a "cable system". 47 U.S.C. Section 522(4).

[4] 47 U.S.C. Section 522(6); Cable Act, Section 602(6).

[5] The policy was incorporated in the FCC's "community antenna television system" definition adopted in 1965. *See Rules re Microwave-Served CATV*, 38 F.C.C. 683, 741 (1965) (defining "community antenna television system" to exclude "any . . . facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house."), *aff'd, Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). The "private cable" exemption continued throughout the FCC's pre-Act regulations. 47 C.F.R. Section 76.5(a)(2) (1984) ("cable system" defined to exclude "[a]ny facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management.")

multiple dwelling units does not use any public right-of-way.[6]

In initially construing the Cable Act definition, the FCC interpreted the addition of the right-of-way restriction to indicate Congress' intent that the use or non-use of public rights-of-way be the sole determinant of whether a facility serving multiple dwelling units was a "cable system".[7] According to the Commission, systems that did not use public rights-of-way were covered by the "SMATV exception" of the new Act, even if the multiple buildings served were not commonly owned, controlled or managed. But after a judicial decision disputed the Commission's interpretation,[8] the agency recognized that the statutory language extended the SMATV exception only to systems that served commonly owned multiple dwelling units *and* did not use public rights-of-way.[9]

Several SMATV operators, led by respondent Beach Communications, sought judicial review of the Commission's interpretation on statutory and constitutional grounds. The court below rejected the statutory challenge, finding that under the plain language of section 602(6), systems that serve multiple unit dwellings that are not commonly owned are cable systems regardless of whether they use public rights-of-way. According to the court, "this plain meaning is neither absurd, nor contra-

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[6] 47 U.S.C. Section 522(6); Cable Act, Section 602(6).

[7] *Amendment of Parts 1, 63, and 76*, 104 F.C.C.2d 386, 396-97 (1986) ("when multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of public rights-of-way, not the ownership, control or management.") The FCC recognized that this interpretive change would mean that many facilities that previously were considered cable systems would no longer be so considered. *Id.* at 397.

[8] *City of Fargo v. Prime Time Entertainment*, No. A3-87-47 (D.N.D. 1988).

[9] *Definition of a Cable Television System*, 5 FCC Rcd. 7638 (1990).

dicted by the legislative history."[10] Furthermore, the court recognized that in adopting the common ownership provision, Congress "incorporated verbatim the Commission's prior 'private cable' provision . . .",[11] and that "the plain meaning of Section 602(6) is made fully intelligible by the regulatory history predating the Cable Act. . . ."[12]

Nonetheless, in reviewing the constitutionality of these distinctions, the court reached the seemingly inconsistent conclusion that "on the record before us, we fail to see a 'rational basis' for franchising" systems serving separately owned multiple unit dwellings but not those serving commonly owned buildings.[13] The court "assume[d]" that minimum equal protection scrutiny requires only a " 'conceivable basis', not an 'articulated basis.' " But the court was "unable to imagine *any* basis for the distinction."[14] The court remanded to the agency to obtain "additional 'legislative facts' " concerning the distinction.[15]

In a separate statement, Judge Mikva offered several persuasive justifications for the distinction. Judge Mikva posited that the distinction between SMATVs based on separate or common ownership of the dwellings served could well reflect the belief that the former is more like a traditional cable system than the latter and "likely to give rise to similar problems from the perspective of the

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[10] Pet. App. 25a.

[11] The court, however, noted that Congress made "one important" change by adding the "public right-of-way" restriction to the exemption. *Id.* at 15a.

[12] *Id.* at 22a.

[13] *Id.* at 34a. The court also questioned the different treatment of systems serving separately owned buildings by *radio waves* and those serving by *wire*. Since the court did not feel it necessary to reach the constitutionality of this distinction, and since this question has not been raised by Petitioner, we do not address the reasons for the distinction herein.

[14] *Id.* at 35a.

[15] *Id.* at 36a.

viewer." [16] According to Judge Mikva, Congress also could have concluded that a facility serving commonly owned buildings "is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh its benefits." *Id.* Congress also could have determined, according to Judge Mikva, "that regulation of facilities serving multiply owned buildings is a reasonable way to enhance the diversity of broadcast information, while SMATV systems serving buildings commonly owned are, again, likely to be smaller and not in need of regulation." [17]

Given that several of Judge Mikva's rationales underlay the original FCC cable system definition essentially codified by Congress in the Cable Act, it is not surprising that the FCC in its Report to the court agreed with Judge Mikva's analysis. However, the Commission declined to offer additional "legislative facts" to explain Congress' intent.[18]

Nonetheless, after reviewing the Commission's response, a divided court of appeals again rejected these justifications. The majority found no basis for assuming that a facility serving separately owned buildings is more similar to a conventional cable system, and that in any event,

[16] *Id.* at 43a.

[17] *Id.*

[18] Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, Pet. App. at 50a. Nonetheless, the Commission feared that expressing any additional policy justifications might lead to the court extending the cable system definition to cover facilities, such as those interconnecting *commonly* owned multiple unit dwellings by cable, that the FCC had never considered to be a cable system. *See id.* at 52a. And while the Commission itself may now have preferred a different policy outcome and therefore did not offer an affirmative endorsement of the distinction drawn, *see id.* at 51a, even the Commission "believe[d] that the justifications for the challenged distinction offered [by Judge Mikva] should satisfy an appropriate rational basis test." *Id.* at 52a.

the "mere impression of 'similarity', without more, does not amount to a 'rational basis'." [19] The majority characterized Judge Mikva's explanations as "putative justifications" that amounted to "naked intuition, unsupported by conceivable facts or policies." [20] On this basis, it found the Cable Act unconstitutional in part, insofar as it requires franchises for systems serving separately owned buildings but not systems serving commonly owned buildings.[21] The court held, accordingly, that SMATVs that did not use public rights-of-way were not to be treated as cable systems for purposes of the Act's franchising requirements, regardless of whether or not the buildings that they served were commonly owned.[22] Judge Mikva dissented.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals misapplied standards set forth by this Court for reviewing the constitutionality of an act of Congress. It failed to accord Congress the requisite deference in legislating, deference that extends to precisely the sort of line-drawing embodied in the Cable Act.

While Congress did not expressly explain the basis for its classification, this Court has established that Congress need not articulate why it has adopted a particular distinction where, as here, there is no invidious discrimination between protected classes. All that is required is a "conceivable" basis for this distinction. In this case, the

[19] *Id.* at 4a.

[20] *Id.*

[21] *Id.* at 3a.

[22] The court expressed no opinion on whether any other aspects other than the franchising provision of the Cable Act would remain applicable to non-exempt SMATV systems, and in fact suggested that in its view, certain provisions of the Cable Act—such as the anti-obscenity provision—might continue to apply to SMATVs. *Id.* at 6a n.5.

dissenting judge and the expert agency identified rationales for the distinction. This Court's review is warranted and necessary to make clear that rationales such as those advanced by Judge Mikva and the Commission in this case—even if speculative—are plainly sufficient to sustain distinctions drawn by Congress.

I. THE COURT OF APPEALS MISAPPLIED THE STANDARDS SET FORTH BY THIS COURT IN FINDING CONGRESS' CLASSIFICATION NOT RATIONAL

In modern judicial history, it is rare indeed where a court has found an act of Congress unconstitutional on equal protection grounds where the challenged classifications do not involve protected classes or fundamental interests.[23] This Court has repeatedly explained that the standard for determining whether a distinction drawn by Congress is constitutional is "deferential":

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.[24]

Thus, a legislative distinction that does not burden a suspect class or a fundamental interest will be sustained "unless the varying treatment of different groups or persons is so unrelated so the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[25] While the appellate court claimed to apply these principles, *see* Pet. App. at 33a, it is clear that it subjected the cable system

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[23] *See* Concurring Opinion of Mikva, C.J. at Pet. App. 39a.

[24] *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

[25] *Vance v. Bradley*, 440 U.S. 93, 99 (1979).

definition to a far more exacting level of scrutiny than those standards allow.

Under the tests articulated by this Court, the rationality of the common ownership distinctions between SMATVs embodied in the "cable system" definition cannot seriously be in doubt. First, "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. . . . Such action by a legislature is presumed to be valid."[26] The line Congress drew here, subjecting some SMATVs to its legislative scheme while exempting others, falls squarely within the "rough accommodation"[27] that legislatures are entitled to make. That the court of appeals could have conceived of a different place for distinguishing among SMATVs based solely on use of public rights-of-way, rather than based on ownership of the buildings served, does not make Congress' choice irrational.[28]

Rather, Congress' classification will be upheld under minimal equal protection scrutiny "if any state of facts reasonably may be conceived to justify it." *Sullivan v. Stroop*, —— U.S. ——, 110 S.Ct. 2499, 2504 (1990) (*quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)). The court clearly erred in applying this standard but holding that it could "conceive" of no basis for the dis-

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[26] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (citation omitted) (upholding Massachusetts mandatory retirement statute). *See also City of New Orleans v. Dukes*, 427 U.S. at 303 ("rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.")

[27] *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69 (1913).

[28] *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[t]he fact that the line might have been drawn differently

tinction drawn. Several such bases can be found—in the decades-old FCC definition upon which the Cable Act definition was based, in Judge Mikva's concurring opinion, and in the Commission's adoption of that opinion.

The differing treatment accorded by Congress makes sense, based on the Commission's experience with commonly owned SMATVs and its reluctance to treat them as cable systems. In 1977, the FCC explained in response to commenters urging parity of treatment between cable systems and master antenna television ("MATV")[29] systems (including those serving commonly owned buildings) that the "common ownership" requirement, among other things, limited the MATV provider to "several hundred subscribers within the four walls of a highrise facility, who generally are not paying separately for the

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at some point is a matter for legislative, rather than judicial, consideration.")

In fact, Congress' choice is consistent with FCC pre-Cable Act policy, which did not link its definition of cable system to use of the public rights-of-way at all. *See Notice of Proposed Rulemaking in Docket No. 20561*, 54 F.C.C.2d 824, 826 (1975) (noting that "planned and resort communities have been held to fall within our [cable television system] definition, despite the fact that they often operate on private land and utilize no public rights-of-way, and serve only residents of the private community rather than the general public."); *Citizens Development Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (facility serving individual homes held to be a cable system, even where it "operate[d] on private property and serve[d] only residents of a private community and not the general public in the surrounding area."); *Bayhead Mobile Home Park*, 47 F.C.C.2d 763 (1974) (finding mobile home park to be cable system, even though located on privately-owned property).

[29] MATV systems predated satellite master antenna systems, but both are functionally equivalent in operation. Both serve subscribers in multiple dwelling units through use of a master antenna. *See generally N.Y. State Commission on Cable Television v. FCC*, 749 F.2d 804, 806 (D.C. Cir. 1984) (describing SMATV and MATV operations).

service."[30] It further reasoned that MATVs serving commonly owned multiple dwelling units were considered to be "not a competitive entry into something like cable television service but an almost necessary improvement to the business of leasing or selling dwellings."[31]

The FCC later clarified that

> in attempting to make [a distinction between regulated and unregulated facilities], we have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can safely be ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively established certain maximum size limitations.[32]

Thus, SMATVs providing service to *non-commonly* owned buildings presumably were believed to fall more on the line of a "competitive entry" into cable television service, with the potential to serve a larger number of subscribers, than would be true for single building SMATVs or those serving commonly owned buildings.

The Commission has always considered facilities serving separately owned multiple dwelling units to be cable systems subject to its regulatory requirements. That Congress took this same approach in its new legislative scheme for cable regulation can hardly be considered "irrational." Further, it is hardly "inconceivable" that Congress also could have viewed a system that could wire any number of unrelated apartment complexes in a private development as more like a conventional cable system than an amenity provided by landlords to tenants. Or that Congress could have chosen common ownership of the buildings served as a rough surrogate for imposing

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[30] *Cable Television Systems*, 63 F.C.C.2d 956, 996 (1977).

[31] *Id.* at 997.

[32] *Cable Television System*, 67 F.C.C.2d 716, 726 (1978).

limits on the number of subscribers served by unregulated entities.

In refusing to credit these rationales, the court of appeals simply *disagreed* with Congress' determination that ownership, management and control of multiple dwelling units were at all relevant for determining whether a facility should be subject to regulation. But it is not the appellate court's province to overturn that judgment—nor does the fact that a line could be drawn at a different point make Congress' judgment "irrational."

The rationality of that approach is not undermined by the imposition of the mandatory franchising provision in the Cable Act. The appellate court apparently considered use of public rights-of-way as the sole justification for requiring a franchise, and thus found that imposition of a franchise requirement on one type of SMATV located on private property served no purpose in the Act.[33]

But as Judge Mikva pointed out, Congress intended to promote a wide range of consumer-interest and information-diversifying goals in the Cable Act, not all of which were tied to use of public rights-of-way.[34] These included establishing a national policy concerning cable communications; establishing franchise procedures and standards which encourage growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; and assuring that "cable communications provide and are

[33] *See* Pet. App. 4a, 6a.

[34] In fact, entities other than SMATVs that do not use public rights-of-way would also be considered cable systems under the Act, including facilities providing cable service to private homes in a private development. *See Massachusetts Community Antenna Television Commission*, 2 FCC Rcd. 7321 (1987), *appeal dismissed sub nom., Channel One Systems, Inc. v. FCC*, 848 F.2d 1305 (D.C. Cir. 1988) (finding system serving a planned community which included single family dwellings is a cable system and not exempt from the Act, regardless of the use of public rights-of-way).

encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. Section 521. Congress easily could have determined that, for purposes of these policy interests, separately owned apartment complexes served by wire by a single SMATV operator should be treated as cable systems, even if public rights-of-way are not used, while systems serving only buildings under common ownership were less likely to share the attributes of—and require the same regulatory treatment as—conventional cable systems. Such a determination is hardly inconceivable, nor is it irrational.

To be sure, Congress did not articulate reasons in the Act or its legislative history for imposing differential treatment of SMATVs based on ownership of the buildings served. But that is not required. This Court has made clear that justifications for different treatment need not appear in the legislative or administrative record:

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

United States R.R. Retirement Bd. v. Fritz, 449 U.S. at 179 (*quoting Flemming v. Nestor*, 463 U.S. at 612).[35] It is impossible to square the court of appeals' insistence that the FCC provide additional "legislative facts"—or

[35] *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (under rational basis standard "a statute will be sustained if the legislature *could have reasonably concluded* that the challenged classification would promote a legitimate state purpose.") (emphasis supplied); *Sullivan v. Stroop*, —— U.S. ——, 110 S.Ct. at 2504 (a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'") (emphasis supplied) (*quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987).

the court's rejection of Judge Mikva's proffered justifications as "naked intuition"—with the relaxed inquiry into legislative justifications that the rationality test entails.

Judge Mikva articulated several wholly "plausible reasons" for the legislative distinction at issue in this case. The FCC agreed that those were logical and likely reasons in responding to the appellate court's remand. Indeed, those reasons are firmly grounded in FCC precedent, in which the expert agency itself drew lines to distinguish between entities more like traditional cable systems and those that are mere "amenities" provided by a landlord to tenants. In failing to credit those reasons, the appellate court improperly overturned nearly three decades of Commission precedent and misapplied this Court's even longer held constitutional standards.

This legal error has practical consequences as well. By improperly substituting its judgment for that of Congress as to which entities should be regulated, the court of appeals upset a carefully balanced legislative and regulatory scheme. It freed from regulation entities that can serve relatively large groups of subscribers within a community. In so doing, contrary to the will of Congress, the court also opened up traditional cable systems to unfair competition by unregulated entities that operate in a manner virtually identical to those cable systems. All SMATVs that do not use public rights-of-way by wire—including those that have always been considered cable systems—are now free from the burdens imposed on traditional cable operators, such as the mandated provision of access channels for the use of others, payment of franchise fees to local authorities,[36] and complying with a wide

[36] *E.g.*, 47 U.S.C. Section 611 (allowing franchising authorities to establish requirements for channel capacity for public, educational, or governmental use); Section 612 (requiring cable operators to designate channel capacity for lease by others); Section 622 (payment by a cable operator of a franchise fee); Section 623 (allowing regulation of rates); Section 624 (regulation of services, facilities and equipment by franchisors).

range of FCC rules, such as those regarding program exclusivity, signal leakage, and technical standards.[37] The court of appeals' decision encourages unregulated "cream skimming" of desirable pockets of a community by unregulated entities, to the detriment of cable subscribers throughout the franchise area.[38] It creates an unequal scheme for the treatment of systems serving private housing developments and those serving municipalities, even where those private developments can cover substantial areas and include large numbers of separately owned apartment complexes.

It is to remedy this disruption of the legislative objectives of Congress as well as to clarify the proper scope of judicial review of Congressional line-drawing that this Court should review the decision below.

[37] *E.g.*, 47 C.F.R. Subpart F (requiring cable system nonduplication of network and syndicated programming contained in local broadcast signals); Subpart K (requiring cable system adherence to certain technical standards and signal leakage monitoring and reporting).

[38] For example, SMATV operators apparently have interpreted the court's decision to allow them unregulated entry into planned community developments, and to serve single family homes in new privately owned housing developments proliferating in areas such as Florida and California. *See Multichannel News*, "SMATVs Win Major Right-of-Way Suit on Appeal," June 15, 1992 at 16.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I, Diane Burstein, hereby certify that three true copies of the foregoing Brief for Respondent National Cable Television Association in Support of Petition For A Writ of Certiorari were served this 28th day of October, 1992 by depositing true copies thereof with the United States Postal Service, first-class postage prepaid, addressed to:

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